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10/645,093	08/21/2003	Kenneth W. Cowan	NUM-02502	7283

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EXAMINER	
KISS, ERIC B	
ART UNIT	**PAPER NUMBER**
2192	

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
3 MONTHS	01/18/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

Office Action Summary	Application No.	Applicant(s)	
	10/645,093	COWAN, KENNETH W.	
	Examiner	Art Unit	
	Eric B. Kiss	2192	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *21 August 2003*.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-18,29-45,56 and 57* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-18,29-45,56 and 57* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☒ The specification is objected to by the Examiner.

10)☒ The drawing(s) filed on *21 August 2003* is/are: a)☒ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

1. Claims 1-18, 29-45, 56, and 57 have been examined.

Specification

2. The use of trademarks, such as "Intel", "Microsoft Windows", "Windows", "Windows NT", "NuMega", "NuMega DevPartner Studio", "BoundsChecker", and "ActiveX", has been noted in this application. Trademarks should be capitalized wherever they appear (capitalize each letter or accompany each trademark with an appropriate designation symbol, *e.g.*, ™ or ®) and be accompanied by the generic terminology (use trademarks as adjectives modifying a descriptive noun).

Although the use of trademarks is permissible in patent applications, the proprietary nature of the marks should be respected and every effort made to prevent their use in any manner which might adversely affect their validity as trademarks.

Claim Rejections - 35 USC § 112

3. The following is a quotation of the second paragraph of 35 U.S.C. 112:

> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 5 and 56 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claims 5 and 56 contain the trademark/trade name ACTIVEX. Where a trademark or trade name is used in a claim as a limitation to identify or describe a particular material or product, the claim does not comply with the requirements of 35 U.S.C. 112, second paragraph. See *Ex parte Simpson*, 218 USPQ 1020 (Bd. App. 1982). The claim scope is uncertain since the

trademark or trade name cannot be used properly to identify any particular material or product. A trademark or trade name is used to identify a source of goods, and not the goods themselves. Thus, a trademark or trade name does not identify or describe the goods associated with the trademark or trade name. In the present case, the trademark/trade name is used to identify/describe a particular computer programming architecture and, accordingly, the identification/description is indefinite.

Double Patenting

4. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

5. Claims 1-18, 29-45, 56, and 57 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-18 and 29-45 of U.S. Patent No. 6,701,519. Although the conflicting claims are not identical, they are not patentably distinct from each other.

A later claim that is not patentably distinct from an earlier claim in a commonly owned patent is invalid for obvious-type double patenting. *In re Berg*, 140 F.3d 1428, 1431, 46 USPQ2d 1226, 1229 (Fed. Cir. 1998). A later patent claim is not patentably distinct from an earlier patent claim if the later claim is obvious over, or anticipated by, the earlier claim. *In re Longi*, 759 F.2d at 896, 225 USPQ at 651 (affirming a holding of obviousness-type double patenting because the claims at issue were obvious over claims in four prior art patents); *In re Berg*, 140 F.3d at 1437, 46 USPQ2d at 1233 (Fed. Cir. 1998) (affirming a holding of obviousness-type double patenting where a patent application claim to a genus is anticipated by a patent claim to a species within that genus).

Regarding pending claims 1-18 and 57, the table below shows how each of these claims is anticipated by claims 1-18 of U.S. Patent No. 6,701,519. Note that pending claim 1 is a broader version of claim 1 issued in U.S. Patent No. 6,701,519, and that pending claim 1 does not require the steps of determining a first record of platform information for which code coverage is being assessed and performing a set intersection operation between said first record of platform information and said one or more records of platform information to form a resulting set of program executions associated with said set intersection operation, each program execution included in said set of one or more program executions corresponding to one of said one or more records of platform information that is similar to said first record of platform information.

Thus, pending claim 1 may be considered as defining a broader genus version of the species defined in claim 1 of U.S. Patent No. 6,701,519.

U.S. Patent No. 6,701,519	Instant Application
Claim 1. A method executed in a computer system for automatically tracking platform usage comprising: enabling collection of one or more records of platform information for a plurality of programs prior to execution of each of said plurality of programs executing each of said plurality of programs recording, in response to said enabling, one or more records of platform information for a plurality of program executions corresponding to said plurality of programs assessing platform usage using said one or more records of platform information in accordance with at least one predetermined criteria	**Claim 1.** A method executed in a computer system for automatically tracking hardware and software platform usage for a plurality of program executions on a plurality of hardware and software platforms comprising: enabling collection of one or more records of hardware and software platform information prior to execution of each of a plurality of programs; executing each of said plurality of programs; recording, in a central data storage device in response to said enabling, one or more records of hardware and software platform information for said plurality of program executions; assessing, in accordance with at least one predetermined criteria, at least one of hardware and software platform usage using said one or more records of hardware and software platform information from said plurality of program executions
Claim 2. each of said one or more records of platform information includes software component data and system configuration data	**Claim 2.** each of said one or more records of hardware and software platform information including software component data and system configuration data
Claim 3. said system configuration data includes hardware data and software settings describing an environment of a computer system in which a program is executed	**Claim 3.** said system configuration data including hardware data and software settings describing an environment of a computer system in which a program is executed
Claim 4. at least a first portion of the software component data corresponds to a software component that is a shared library	**Claim 4.** at least a first portion of the software component data corresponding to a software component that is a shared library
Claim 5. the shared library is one of a dynamic link library and an ActiveX Control library	**Claim 5.** the shared library being one of a dynamic link library and an ActiveX Control library

U.S. Patent No. 6,701,519	Instant Application
Claim 6. the system configuration information includes data describing at least one of: a number of processors in a particular platform, a system name, an indicator as to a hardware processor type, an operating system identifier, an amount of physical memory, and an identifier for each program execution associated with said system configuration information being described	**Claim 6.** the system configuration information including data describing at least one of: a number of processors in a particular platform, a system name, an indicator as to a hardware processor type, an operating system identifier, an amount of physical memory, and an identifier for each program execution associated with said system configuration information being described
Claim 10. performing one or more routine calls using a function provided by an operating system to gather a portion of at least one of the records of platform information	**Claim 7.** performing one or more routine calls using a function provided by an operating system to gather a portion of at least one of the records of hardware and software platform information
Claim 11. obtaining software component data using an event reporting mechanism that reports information to a monitor process	**Claim 8.** obtaining software component data using an event reporting mechanism that reports information to a monitor process
Claim 12. linking a program to be tested to include monitoring; and reporting software component data at runtime to a monitor process by monitoring predetermined calls made from a portion of a program being executed	**Claim 9.** linking a program to be tested to include monitoring; and reporting software component data at runtime to a monitor process by monitoring predetermined calls made from a portion of a program being executed
Claim 13. the calls being monitored are in user supplied code	**Claim 10.** the calls being monitored being in user supplied code
Claim 14. the program being executed includes a software component directly invoked from a portion of user supplied code	**Claim 11.** the program being executed including a software component directly invoked from a portion of user supplied code
Claim 15. the program being executed includes at least one software component that is not directly invoked from a portion of user supplied code	**Claim 12.** the program being executed including at least one software component that is not directly invoked from a portion of user supplied code
Claim 7. a plurality of platforms are associated with said plurality of program executions, and the method further including: recording, for each of said plurality of platforms, software component data associated with each software component included in said each platform, said software component data includes information uniquely identifying said each software component	**Claim 13.** a plurality of hardware and software platforms being associated with said plurality of program executions, and the method further including: recording, for each of said plurality of hardware and software platforms, software component data associated with each software component included in said each hardware and software platform, said software component data including information uniquely identifying said each software component

U.S. Patent No. 6,701,519	Instant Application
Claim 8. said software component data includes at least one of a module name, a link date, a file version, a file size, and a product version	**Claim 14.** said software component data including at least one of a module name, a link date, a file version, a file size, and a product version
Claim 9. said software component information includes data indicating one or more of said plurality of program executions that are associated with a first software component corresponding to said software component information	**Claim 15.** the software component information including data indicating one or more of said plurality of program executions that are associated with a first software component corresponding to said software component information
Claim 16. said software component information includes data indicating one or more of said plurality of program executions that are associated with a first software component corresponding to said software component information	**Claim 16.** forming a set union of said one or more records of hardware and software platform information to identify each unique platform
Claim 17. each of said one or more records of platform information includes software component data and system configuration data, and the method further includes: forming an initial union set that includes a first record of platform information; determining for a second record of platform information if there are differences in system configuration data associated with said first and second records of platform information; determining for said second record of platform information if there are differences in software component data associated with said first and second records of platform information; and adding said second record of platform information to said initial union set if any differences are determined in system configuration data or software component data.	**Claim 17.** each of said one or more records of hardware and software platform information includes software component data and system configuration data, and the method further includes: forming an initial union set that includes a first record of hardware and software platform information; determining for a second record of hardware and software platform information if there are differences in system configuration data associated with said first and second records of hardware and software platform information; determining for said second record of hardware and software platform information if there are differences in software component data associated with said first and second records of hardware and software platform information; and adding said second record of hardware and software platform information to said initial union set if any differences are determined in system configuration data or software component data.

U.S. Patent No. 6,701,519	Instant Application
Claim 18. determining differences in software component data includes: determining differences in named software modules associated with said first and second records of platform information; and determining differences in attributes of a first named software module included in said first and said second records of platform information	**Claim 18.** determining differences in software component data includes: determining differences in named software modules associated with said first and second records of hardware and software platform information; and determining differences in attributes of a first named software module included in said first and said second records of hardware and software platform information.
Claim 1. A method executed in a computer system for automatically tracking platform usage comprising: enabling collection of one or more records of platform information for a plurality of programs prior to execution of each of said plurality of programs executing each of said plurality of programs recording, in response to said enabling, one or more records of platform information for a plurality of program executions corresponding to said plurality of programs assessing platform usage using said one or more records of platform information in accordance with at least one predetermined criteria	**Claim 57.** A method executed in a computer system for automatically tracking hardware and software platform usage for a plurality of program executions on a plurality of hardware and software platforms comprising: enabling collection of one or more records of hardware and software platform information prior to execution of each of said plurality of programs; executing each of said plurality of programs; recording, in a central data storage device in response to said enabling, one or more records of hardware and software platform information for said plurality of program executions; and querying said central data storage device, in accordance with at least one predetermined criteria using said one or more records of hardware and software platform information from said plurality of program executions, to determine at least one of hardware and software platform usage.

Pending claims 29-45 and 56 of the instant application are product claims substantially paralleling the limitations in instant system claims 1-18. Likewise, claims 29-45 of U.S. Patent No. 6,701,519 are product claims substantially paralleling the limitations in patented claims 1-4

and 6-18, and pending claim 56 is merely a product version of patented claim 5, as discussed above. By a similar comparison to that shown in the table and discussion above with respect to pending claims 1-18, pending claims 29-45 and 56 are not patentably distinct from patented claims 5 and 29-45 (*i.e.*, claims 29-45 of U.S. Patent No. 6,701,519 are believed to anticipate claims 29-45 of the instant application and claim 5 of U.S. Patent No. 6,701,519 renders obvious pending claim 56).

Thus, for the foregoing reasons, pending claims 1-18, 29-45, 56, and 57 are not patentably distinct from claims 1-18 and 29-45 of U.S. Patent No. 6,701,519, and as such, are unpatentable for obviousness-type double patenting.

Claim Rejections - 35 USC § 102

6. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

7. Claims 1-18, 29-45, 56, and 57 are rejected under 35 U.S.C. 102(b) as being anticipated by "DevCenter Concepts, NuMega™ DevCenter™, Making Software Development Manageable™," March 1999, Compuware Corp., pp. i-x and 1-87 (hereinafter "[DCC1999]").

As per claim 1, [DCC1999] discloses:

enabling collection of one or more records of hardware and software platform information prior to execution of each of a plurality of programs (see, e.g., p. 2 (. . . enable the

capture and distribution of information that includes: . . . Hardware and software configuration information about the platforms on which an application has been run . . . .));

executing each of said plurality of programs (*Id.*);

recording, in a central data storage device in response to said enabling, one or more records of hardware and software platform information for said plurality of program executions (*Id.*; p. 81 (Platform Configuration Information); p. 47 (describing in more detail the Defect item in the DevCenter object-oriented database)); and

assessing, in accordance with at least one predetermined criteria, at least one of hardware and software platform usage using said one or more records of hardware and software platform information from said plurality of program executions (see, e.g., p. 10, lines 1-3; p. 22, last two paragraphs).

As per claim 2, [DCC1999] further discloses each of said one or more records of hardware and software platform information including software component data and system configuration data (see, e.g., p. 2 (. . . enable the capture and distribution of information that includes: . . . Hardware and software configuration information about the platforms on which an application has been run . . . .)).

As per claim 3, [DCC1999] further discloses said system configuration data including hardware data and software settings describing an environment of a computer system in which a program is executed (see, e.g., p. 2 (. . . enable the capture and distribution of information that includes: . . . Hardware and software configuration information about the platforms on which an application has been run . . . .)).

As per claim 4, [DCC1999] further discloses at least a first portion of the software component data corresponding to a software component that is a shared library (see, e.g., p. 2 (. . . about executable components such as DLL, EXE, and OCX files)).

As per claim 5, [DCC1999] further discloses the shared library being one of a dynamic link library and an ActiveX Control library (*Id.*).

As per claim 6, [DCC1999] further discloses the system configuration information including data describing at least one of: a number of processors in a particular platform, a system name, an indicator as to a hardware processor type, an operating system identifier, an amount of physical memory, and an identifier for each program execution associated with said system configuration information being described (see, e.g., p. 81 (. . . information such as the type of processor, amount of memory, screen resolution, and the operating system)).

As per claim 7, [DCC1999] further discloses performing one or more routine calls using a function provided by an operating system to gather a portion of at least one of the records of hardware and software platform information (see, e.g., p. 81 (. . . link date and time and version resource strings).

As per claim 8, [DCC1999] further discloses obtaining software component data using an event reporting mechanism that reports information to a monitor process (see, e.g., p. 22, last paragraph)

As per claim 9, [DCC1999] further discloses linking a program to be tested to include monitoring (see, e.g., p. 22 (. . . code instrumented for collecting coverage data . . .)); and reporting software component data at runtime to a monitor process by monitoring predetermined

calls made from a portion of a program being executed (*Id.* (. . . DevCenter collects information about what code modules, functions, and lines get executed.).

As per claim 10, [DCC1999] further discloses the calls being monitored being in user supplied code (*Id.*).

As per claim 11, [DCC1999] further discloses the program being executed including a software component directly invoked from a portion of user supplied code (*Id.* (code modules, functions, and lines. . .).

As per claim 12, [DCC1999] further discloses the program being executed including at least one software component that is not directly invoked from a portion of user supplied code (see, e.g., p. 81 (. . . tracks the details of DLL, OCX, and the EXE files used by the application being debugged)).

As per claim 13, [DCC1999] further discloses a plurality of hardware and software platforms being associated with said plurality of program executions (see, e.g., p. 81, last two paragraphs), and the method further including: recording, for each of said plurality of hardware and software platforms, software component data associated with each software component included in said each hardware and software platform, said software component data including information uniquely identifying said each software component (see, e.g., p. 81, last two paragraphs).

As per claim 14, [DCC1999] further discloses said software component data including at least one of a module name, a link date, a file version, a file size, and a product version (see, e.g., p. 81 (. . . link date and time and version resource strings)).

As per claim 15, [DCC1999] further discloses the software component information including data indicating one or more of said plurality of program executions that are associated with a first software component corresponding to said software component information (see, e.g., p. 81, last two paragraphs).

As per claim 16, [DCC1999] further discloses forming a set union of said one or more records of hardware and software platform information to identify each unique platform (see, e.g., p. 10 (Merging Coverage Data); p. 30 (Configuration Coverage Scenario); p. 81 (Platform Configuration Information)).

As per claim 17, [DCC1999] further discloses each of said one or more records of hardware and software platform information includes software component data and system configuration data (see, e.g., p. 81 (. . . DevCenter records hardware and software configuration information . . . .)), and the method further including:

forming an initial union set that includes a first record of hardware and software platform information (see, e.g., p. 81 (Platform Configuration Information));

determining for a second record of hardware and software platform information if there are differences in system configuration data associated with said first and second records of hardware and software platform information (see, e.g., the examples of merging platform information on p. 10 (Merging Coverage Data), p. 30 (Configuration Coverage Scenario) and p. 82 (Importance of Tracked Data));

determining for said second record of hardware and software platform information if there are differences in software component data associated with said first and second records of hardware and software platform information (*See Id.*); and

adding said second record of hardware and software platform information to said initial union set if any differences are determined in system configuration data or software component data (*See Id.*).

As per claim 18, [DCC1999] further discloses determining differences in software component data includes:

determining differences in named software modules associated with said first and second records of hardware and software platform information (see, e.g., the examples of merging platform information on p. 10 (Merging Coverage Data), p. 30 (Configuration Coverage Scenario) and p. 82 (Importance of Tracked Data)); and

determining differences in attributes of a first named software module included in said first and said second records of hardware and software platform information (*See Id.*).

As per claims 29-45 and 56, these are computer program products substantially paralleling the claimed methods discussed above (see the discussion of claims 1-18). [DCC1999] further discloses the use of such a product (see, e.g., the Software License Agreement on pp. iii-iv), and all other limitations have been addressed as set forth above.

As per claim 57, [DCC1999] discloses:

enabling collection of one or more records of hardware and software platform information prior to execution of each of a plurality of programs (see, e.g., p. 2 (. . . enable the capture and distribution of information that includes: . . . Hardware and software configuration information about the platforms on which an application has been run . . . .));

executing each of said plurality of programs (*Id.*);

recording, in a central data storage device in response to said enabling, one or more records of hardware and software platform information for said plurality of program executions (*Id.*; p. 81 (Platform Configuration Information); p. 47 (describing in more detail the Defect item in the DevCenter object-oriented database)); and

querying said central data storage device, in accordance with at least one predetermined criteria, at least one of hardware and software platform usage using said one or more records of hardware and software platform information from said plurality of program executions (see, e.g., p. 10, lines 1-3; p. 22, last two paragraphs; see also p. 81, last two paragraphs (. . . construct a TrackRecord query . . . .).

Conclusion

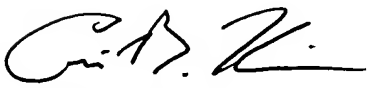
8. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

9. Any inquiry concerning this communication or earlier communications from the Examiner should be directed to Eric B. Kiss whose telephone number is (571) 272-3699. The Examiner can normally be reached on Tue. - Fri., 7:00 am - 4:30 pm. The Examiner can also be reached on alternate Mondays.

If attempts to reach the Examiner by telephone are unsuccessful, the Examiner's supervisor, Tuan Dam, can be reached on (571) 272-3695. The fax phone number for the organization where this application or proceeding is assigned is (571) 273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Any inquiry of a general nature should be directed to the TC 2100 Group receptionist: 571-272-2100.



Eric B. Kiss
January 4, 2007